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Supreme Court of the United States

OCTOBER TERM—1964

No. 132

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

v.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENTS ALLAN P. KIRBY, CHARLES T. IRELAND, JR. AND FRED M. KIRBY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 24, 1965.

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Supreme Court of the United States

OCTOBER TERM—1964

No. 1158

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

v.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENTS ALLAN P. KIRBY, CHARLES T. IRELAND, JR. AND FRED M. KIRBY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PROCEEDINGS BELOW

The instant action seeks to vacate a judgment of the Supreme Court of the State of New York entered after judicial approval of a settlement in a stockholders' derivative action entitled *Zenn, et al.* v. *Anzalone, et al.* (*"Zenn"*), and then to assert anew against Allan P. Kirby, one of 19 defendants in *Zenn*, one of the eight claims which were asserted in *Zenn*. This relief is sought on the charge, among others, that Kirby failed to reveal to the state court facts which he "knew or should have known"

bearing on the fairness and adequacy of the proposed settlement (40a).*

After trial on the merits the district court (Hon. Archie O. Dawson, since deceased) granted judgment for respondents, finding that there was no fraud or withholding of evidence on Kirby's part (169a; 218 F. Supp. at 186), and that the additional evidence alleged to have been withheld would not, in any event, have caused the state court to reach a different conclusion (167a-68a; 218 F. Supp. at 185-186). That judgment was affirmed on appeal, first by a split decision of a three-judge panel of the Court of Appeals for the Second Circuit (App. B, 4a-50a; 333 F. 2d 327), and thereafter, on rehearing *en banc*, by an equally divided court (App. A, 2a-3a; 340 F. 2d 311).

JURISDICTION

Petitioners are not parties to the instant action. They have filed a separate petition for certiorari (No. 1157) from a decision of the Court of Appeals for the Second Circuit affirming the district court's denial of their motion to intervene in the instant action for the purpose of filing a petition for a writ of certiorari herein.

QUESTION PRESENTED

The only question presented by the instant petition is whether this Court should review the district court's findings of fact, which were affirmed by the Court of Appeals, that (1) there was no personal dereliction on the part

* Parenthetic references followed by a lower case "a" refer to the Appendix on appeal before the Court of Appeals. References prefixed by "App. A" or "App. B" refer to the appendices contained in the Petition before this Court.

of Kirby, and (2) the evidence claimed not to have been disclosed by persons other than Kirby was cumulative and would not have led the state court to a different conclusion.

STATEMENT

In view of the many serious misstatements* in the petition, the essential facts are briefly summarized below.

In 1954 *Zenn* v. *Anzalone,* a stockholders' derivative action, was brought in the New York State Supreme Court on behalf of Alleghany, against its directors (including Robert R. Young and Kirby), Robert W. Purcell, who was a former director of Alleghany, John D. Murchison and Clint W. Murchison, Jr., doing business as Murchison Brothers, and others (906a-08a). Of eight causes of action in *Zenn,* only the first, which complained of the so-called "1950 IDS exchange transaction," is involved here.

The 1950 IDS Exchange Transaction

On December 6, 1949, the Alleghany board of directors authorized the exchange by Alleghany of certain non-voting IDS (Investors Diversified Services Inc.) shares owned by it for preferred shares of Alleghany owned by officers of Alleghany (487a). Subsequent to ratification at the annual Alleghany stockholders meeting on May 3, 1950, the actual exchange of stock took place (956a).

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* For example, petitioners state (Pet., pp. 12-13) that the Court of Appeals agreed "that facts and relevant documents were concealed during the course of the settlement negotiations and hearings regarding claims based upon that transaction" and that Judge Moore of the Court of Appeals found that "relevant documents were concealed" (Pet., p. 13). No such agreement or finding on this crucial question is to be found in the record.

The *Zenn* complaint alleged that there was a difference in the aggregate market price of the IDS and Alleghany shares on the date of the exchange and that misleading and incomplete statements had been made in the proxy material for the 1950 annual meeting (583a-87a). The complaint sought rescission or, in the alternative, money damages (606a-08a).

New York Supreme Court Confirmation of the Referee's Report and Approval of Settlement

About a year after litigation was commenced, a settlement of *Zenn* was proposed and on August 18, 1955 a New York Supreme Court Referee was appointed in the *Zenn* action "to inquire on the merits into the fairness, reasonableness and adequacy of a stipulation of settlement dated July 25, 1955 and to report as to whether such proposed settlement should be approved and confirmed" (715a).

On November 17, 1958, after taking over 4,600 pages of testimony from 18 witnesses in a thoroughly contested proceeding in which 22 law firms appeared, some in vigorous opposition to the settlement, the Referee filed with the state court a 125-page report assessing each of the eight claims asserted in *Zenn* (136a; 905a; 1406a-1410a). He recommended approval of the proposed settlement. With respect to the 1950 IDS exchange transaction, the Referee concluded, after reviewing the various affirmative defenses interposed by the defendants in *Zenn*, that "the substantial defenses above reviewed militate against the probability of success" if the claim were pressed in court (978a).

Kirby had never been served in the *Zenn* action, was never served with a subpoena nor called on to produce

any files, and did not appear as a party until after the settlement hearings (134a; 160a). The Referee found specifically that Kirby's appearance and testimony were not necessary to approval of the terms of the settlement (136a; 1566a).

The state court approved the Referee's report on March 12, 1959 (17 Misc. 2d 897, 191 N.Y.S.2d 840), but directed that no order be entered in the state court until an injunction entered in another derivative action then pending in the federal district court, entitled *Breswick* v. *Briggs*, should be vacated.

Entry and Subsequent Vacatur of the Injunction in *Breswick* v. *Briggs* ("Breswick")

The other stockholders' derivative action, *Breswick* v. *Briggs*, had been commenced on February 14, 1955 against Kirby and others in the United States District Court for the Southern District of New York (134a). It contained no claim arising out of the 1950 IDS exchange transaction, but alleged substantially all of the other seven causes of action which had been asserted in *Zenn* (924a-25a).

On October 27, 1955 the *Breswick* plaintiffs had obtained an order enjoining the *Breswick* defendants from "interposing in this [*Breswick*] action any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the [*Breswick*] plaintiffs or their attorneys" (898a-99a; 994a). The injunction was entered for reasons which the dissenting opinion agreed were "unrelated" to the issues in *Zenn*, and specifically unrelated to the *Zenn* cause of action based on the 1950 IDS exchange transaction (App. B, 48a; 333 F.2d at 347). Its sole purpose was to pro-

tect the bargaining position of the federal court plaintiffs on the other causes of action.*

Settlement negotiations with the *Breswick* plaintiffs were concluded in December 1959 and thereupon, by consent of counsel for the *Breswick* plaintiffs, the district court vacated the injunction (1106a).** Counsel for the *Breswick* plaintiffs specifically pointed out to the federal court that the vacatur did not hinge upon or constitute an approval of the settlement which had been worked out in the New York Supreme Court in *Zenn*:

> "Your honor is not passing on the stipulation as such, if I may say so. The stipulation is before you to explain why we are making the recommendation here. The merits of the stipulation are, strictly speaking, for the State Court" (Ex. 30b, Transcript of hearings before Judge Dimock on December 24, 1959, p. 120).

Consent orders vacating the *Breswick* injunction were entered on December 24, 1959 (1105a-07a).

Entry of Final Judgment in *Zenn*

On December 28 and 29, 1959 the New York Supreme Court, having been advised of the lifting of the *Breswick* injunction, entered orders (1355a; 1371a) providing for

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* Unreported opinion of Hon. John W. Clancy, U.S.D.J., in *Breswick* v. *Briggs*, Civ. No. 98-371, S.D.N.Y., Nov. 1, 1955.

** Petitioners erroneously state (Pet., p. 10) that Kirby induced Ireland to offer a secret bribe to settle the *Breswick* litigation, and (Pet., p. 25) that "In pursuit of Kirby's interest the trial court found that he had offered a bribe to the plaintiff's representative." No such finding was ever made. In fact the reference cited by petitioners shows that, far from finding a bribe attempt, Judge Dawson found that the offer of "the consultantship was not to be a secret matter but something which was to be revealed to the Court as part of the settlement" (148a; 218 F. Supp. at 177).

the payment to Alleghany of $3,000,000 cash and for the return by the Murchisons to Alleghany of control of IDS, which the derivative stockholders in *Zenn* valued at up to $19,000,000.

On June 21, 1960 a final judgment was entered in *Zenn*, dismissing the action on the merits as to all defendants, including the Murchisons (1419a-27a).

Commencement of the Instant Action

Having thus lost control of IDS as a result of the *Zenn* settlement, the Murchisons brought the instant action on September 8, 1960, as part of a proxy battle against Kirby for control of Alleghany itself, for the purpose of regaining control of IDS (125a). The Murchisons charged that Kirby had entered into a corrupt bargain to bribe one of the principal figures in the *Zenn* litigation in order to settle his own liability (126a).

After the Murchisons obtained control of Alleghany in May, 1961, they caused Alleghany to be substituted as plaintiff and their own counsel to be substituted as counsel for Alleghany (125a-126a). An "amended and supplemental complaint" filed on December 18, 1962 asserted for the first time a charge that Kirby, personally, had perpetrated a fraud on the New York Supreme Court in failing to adduce, during the hearings before the Referee in *Zenn*, facts which he "knew or should have known" and which were material to the appraisal by the Referee and the Supreme Court of the merits of the first cause of action in *Zenn* (40a).

Trial of the Action

Prior to the trial of this action, over 20,000 pages of deposition testimony on the part of twenty-five witnesses

(including an exhaustive examination of Kirby) were taken (125a). Upon plaintiff's acknowledgment during pre-trial that the claim it wished to pursue was barred as res judicata unless it could first establish grounds for vacating the *Zenn* judgment, trial below was limited to plaintiff's charge of fraud on the part of Kirby in the procurement of the *Zenn* judgment, with trial on the merits of the underlying claim to await the outcome of trial of plaintiff's fraud charges (183a).

The case was tried before Hon. Archie O. Dawson, U.S.D.J. (since deceased) from April 1 through April 19, 1963. The transcript, which includes the testimony of Kirby, Purcell and various other witnesses, is over 2,400 pages long. More than 220 exhibits were introduced (130a).

The Findings and Decisions Below

1. Finding of No Dereliction by Kirby in the Procurement of the *Zenn* Judgment

(a) The "corrupt bargain"

As to the claim that Kirby, acting through Charles T. Ireland, Jr., had procured the vacatur of the *Breswick* injunction by means of a "corrupt bargain" with a representative of the *Breswick* plaintiffs, the district court found that "the evidence was all completely to the contrary" (159a; 218 F. Supp. at 182). No appeal was taken from the dismissal of that charge.

(b) The "non-adduction" of evidence in *Zenn*

With respect to the claim that during the Referee's hearings in *Zenn* Kirby had "failed to adduce or cause to be adduced" facts which he "knew or should have known concerning the financial condition, future earnings

and prospects of IDS" (40a) there was no proof below of any such concealment, or that Kirby had knowledge of the evidence allegedly not adduced, and the district court found that:

> "This is not a question of Kirby altering or concealing any facts, but rather a question of whether he was under an affirmative duty to present facts which might have a bearing upon his liability" (161a; 218 F. Supp. at 182).

The district court concluded that plaintiff had "completely and utterly failed to establish" its charge of wrongdoing by Kirby in the procurement of the *Zenn* judgment (172a; 218 F. Supp. at 187). On appeal, this finding was concurred in by all three members of the panel of the Court of Appeals, the dissenting opinion declaring that:

> "insofar as the plaintiff's case here hinged upon establishing personal dereliction by Kirby with respect to the settlement hearings, this was not made out" (App. B, 28a; 333 F.2d at 338).

2. The Cumulative Nature of the Evidence Alleged to Have Been "Withheld"

(a) The decision of the trial court

The district court, although it found no wrongdoing on Kirby's part, nevertheless went on to consider the significance of the "non-adduced" documents for the purpose of determining:

> "Whether any of them are of such materiality that they would have affected the conclusion of the Referee . . ." (162a; 218 F. Supp. at 183)

and noted:

> "That is an issue of fact" (162a; 218 F. Supp. at 183).

At the trial before the district court the defendants contended that the documents claimed not to have been adduced before the Referee were merely cumulative of the documentary material in the record before the state court Referee, which had included both projections and forecasts of IDS' future earnings and the record of IDS' actual earnings (415a; 501a). The record before the district court included the Referee's findings that Alleghany's 1949 report had informed its stockholders that "the outlook for eventual [IDS] profits is considered to be unusually promising" (962a); that "the stockholders of Alleghany were informed of the generally rising tendency of the market price of IDS" (971a).* After reviewing the documents, and the testimony given with respect to them, against the background of the extensive record before the Referee, reflected in his 125-page report, the district court found as a fact** that:

> "the Court cannot conclude that the failure to have such evidence or to produce it was of such significance that it would have caused the Referee to reach a different conclusion" (168a; 218 F. Supp. at 186).

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* Petitioners erroneously state (Pet., pp. 9-10) that "The Referee found that the insiders had no special knowledge or information which would lead them to believe that a spectacular rise in the value of the IDS shares was imminent." The Referee found "Alleghany stockholders were informed that IDS had just enjoyed great improvement in earnings and that the future of IDS was bright" (962a) and that he assumed "that Young and Kirby in April, 1950, had reason to take a very optimistic view of the future earnings of IDS" (966a).

** The district court also concluded, as a matter of law, that under applicable New York law failure to adduce evidence was not a ground for collateral attack on the judgment of the New York State court approving the *Zenn* settlement (166a-67a; 218 F. Supp. at 184).

(b) The decision of the Court of Appeals

The majority opinion affirmed the trial court's findings of fact and decided that it was unnecessary to review the district court's conclusion of law (App. B, 24a; 333 F.2d at 336). The majority also affirmed the district court's finding that the various documents not in evidence before the Referee, which formed the basis of plaintiff's claim of wrongful "concealment," were not material since the information in them was only "cumulative" of evidence already before the Referee (App. B, 19a; 333 F.2d at 334). With respect to the alleged error of the trial court in excluding certain documents from evidence, the majority found that:

> "The district court had in the record before him evidence virtually identical to that contained in the documents excluded by him, particularly with relation to compilations of projected earnings" (App. B, 12a; 333 F.2d at 331).

The evidence before the district court included the transcript of Purcell's testimony before the Referee in *Zenn*, where Purcell had, near the conclusion of his testimony, pointed out to the Referee and the various stockholders' attorneys that:

> "This company [IDS] produces a very large number of reports, many of which I brought here today, that nobody has asked me about" (1518a).

Purcell testified in the instant case that he had brought with him for examination by the state court Referee "everything I had and it was my practice to keep the pro-

jections" (1311a). With respect to these projections he further testified during trial below:

> "Q. Did you personally assemble the files for this testimony, that you gave, sir? A. Yes, I would say that I did. I asked my secretary to bring me everything, and she brought it in, and I looked it over, and packed it up and took it to court" (1311a-12a).

The dissenting opinion agreed that were plaintiff's evidence merely cumulative of evidence before the Referee he would be compelled to agree with the majority:

> "Since in such complicated litigation some relevant documents will inevitably be overlooked, the undesirability of reopening judgments demands that judicial approval be final unless the undisclosed evidence is of real importance and not merely cumulative of other evidence that was received" (App. B, 37a; 333 F. 2d at 342).

However, ignoring Purcell's testimony, the dissent inferred that one document (Ex. 365 *id.*) had not been made available to the Referee, although known to Purcell and Young.* The dissent further concluded that this document "might have sufficed to tip the scales" during the

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* It is noteworthy that the petition never refers to Ex. 365 *id.* Rather, it relies on Ex. 245 *id.*, a projection of IDS earnings for the years 1950 through 1954 (Pet., p. 7). As to Ex. 245 *id.*, the Court of Appeals stated:

> "These projections produced from the IDS files in discovery proceedings were not admitted in evidence by the district court because there was no evidence that Kirby had ever had them in his possession or that he knew of them. Nor was there any showing that counsel in Zenn had been in any way precluded either in pre-trial or in the settlement hearings from seeking any and all papers in the possession of IDS. To the contrary, there was proof that during the hearings before the Referee (1954-1958) documents in the IDS files were available upon request" (App. B, 10a-11a; 333 F.2d at 330).

hearings before the state court Referee (App. B, 40a; 333 F. 2d at 344). The dissenting judge would have remanded, to give the defendants an opportunity to rebut his inference that Young and Purcell had withheld Ex. 365 *id.* from the Referee (App. B, 50a; 333 F. 2d at 348).*

In his concurring opinion Judge Kaufman took issue with the dissenter's finding that the document which the Referee did not have in the voluminous record before him, Ex. 365 *id.*, was sufficiently significant to warrant reversal of the trial court's findings of fact:

> "As I understand it, the crucial document which Purcell and Young are alleged to have withheld is Exhibit 365 for identification . . .
>
> "But the majority opinion has quite properly noted that the particular pieces of paper which comprise Exhibit 365 could not have been seen by anyone at the time of the exchange transaction—let alone Kirby. . . . Further, as both majority and dissenting opinions observe, the essential information conveyed by Exhibit 365 *was* before the Zenn referee, and was spot-lighted by the vigorous arguments of counsel" (App. B, 25a-26a; 333 F. 2d at 337).

(c) The opinion on rehearing *en banc*

On rehearing, the trial court's decision was reaffirmed, in a per curiam opinion, by an evenly divided Court of Appeals (App. A, 2a-3a; 340 F. 2d 411).

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* Young being dead, this would presumably result in Purcell's testimony being repeated with respect to this issue.

ARGUMENT

The decision below turned on affirmance of the district court's findings of fact (1) that the evidence allegedly withheld from the state court Referee was cumulative and would not have changed the result, and (2) that Kirby had not concealed or withheld any evidence from the Referee. The question before this Court, therefore, is whether it should grant review to determine if the district court erred in these factual findings, particularly in its evaluation of the weight and effect to be given to an IDS earnings projection that had not been put in evidence before the *Zenn* Referee, in light of other projections which were before the Referee. The district court's findings of fact were supported by voluminous evidence.

The differing views expressed by the several Judges of the Court of Appeals were based on differing evaluations of that evidence by the majority and the dissenter. In seeking to draw inferences to support an entirely new charge, which had not been alleged before the district court (i.e., that Young and Purcell, but not Kirby, had withheld evidence from the Referee)*, the dissent ignored contrary testimony given by Purcell, the only person living at the time of trial who could testify on the issue.

This Court has generally followed the principle of refusing to review the findings of fact of courts below, particularly where the district court had the opportunity to observe the witnesses (in this case, Kirby, Purcell and the many others who had participated in the state court settlement being challenged) and to appraise their credi-

* On the contrary, plaintiff's counsel specifically stated to the district court that he made no charge of concealment against either Young or Purcell (1315a).

bility, since a review of such findings "would be of no importance save to the litigants themselves". *Rudolph* v. *United States,* 370 U. S. 269, at 270 (1962); *Accord: United States* v. *Johnston,* 268 U. S. 220, 227 (Holmes, J., 1925); *General Talking Pictures Corp.* v. *Western Elec. Co.,* 304 U. S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Pub. Serv. Co.,* 263 U. S. 508 (1924). See *Appalachian Power Co.* v. *American Institute,* 4 L. Ed. 2d 30, 32, 80 S. Ct. 16 (Brennan, J. 1959).

This rule makes it unnecessary for this Court to consider the questions suggested by petitioners, since such consideration, absent a reversal of the factual findings, could not result in changing the decision below.

This case does not involve substantial questions of federal law or otherwise meet the criteria of this Court's Rule 19

1. In an effort to surmount the confines of the factual issues actually presented by this case, petitioners urge that the principal issue before this Court is whether the "standard of disclosure" of the SEC's proxy rules under Section 14(a) of the Securities Exchange Act should "be imposed by the courts in proceedings brought for violations of the statute" (Pet., p. 18). This was never raised as an issue in the courts below, where other theories were advanced by petitioners' counsel (who have conducted this litigation from its inception). Petitioner's counsel has shown no special circumstances justifying their failure to raise this issue below. In such a case it is the well-established policy of this Court to deny review. *Lawn* v. *United States,* 355 U. S. 339, 362 n.16 (1958); *United States* v. *New York Tel. Co.,* 326 U. S. 638, 651 n.18 (1946); *Duignan* v. *United States,* 274 U. S. 195, 200 (1927).

On its merits, moreover, petitioners' contention is without substance. It is perfectly plain from the language of Section 14(a) of the Securities Exchange Act, and Rule 14a-9 thereunder, that they govern only the solicitation of proxies and have no application to adversary litigation where a plaintiff (unlike a stockholder solicited for a proxy) is represented by counsel with all the court processes for discovery at his command. Petitioners cite nothing in the language or legislative history of Section 14(a) to indicate that it was intended to prescribe standards for the conduct of litigation.* In any event, the instant action is not one to enforce directors' liability under Section 14(a) of the Securities Exchange Act. It is an action brought to vacate the judgment of another court and is subject to all the limitations of such an action. In a collateral attack on a judgment, neither the correctness of that judgment nor the court's determination of a question of law resulting in that judgment may be drawn into issue. *Restatement, Judgments* §11(b), p. 66 (1942).

Furthermore, it would not be fruitful for this Court now to undertake the delicate task of fashioning standards to be applied by a federal court in deciding whether or not to set aside the judgments of a state court in actions based on alleged violations of Section 14(a). The recent

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* Nor does anything in Section 14(a) of the Securities Exchange Act suggest any test for determining the materiality of "non-adduced" evidence urged as a basis for setting aside a judgment in an action alleging violation of that section.

The standard followed by the district court here is the same as that outlined in Rule 60(b) Fed. R. Civ. P. with respect to setting aside a federal judgment on account of newly discovered evidence or fraud of an adverse party. The decisions under Rule 60(b) are clear that in order to warrant the reopening of a prior judgment, newly discovered evidence "must be of such a material and controlling nature as would probably induce a different conclusion, and not merely cumulative," and that proof of fraud must be "clear and convincing." 7 Moore, Federal Practice 243, 257 (2d ed. 1955).

decision of this Court in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) has made it clear that claims based on Section 14(a) of the Securities Exchange Act can no longer be brought in the state courts.

In *Borak* this Court ruled that the federal courts have the power to grant full relief in a stockholder's derivative action based on Section 14(a). Since Section 27 of the Securities Exchange Act gives the federal courts exclusive jurisdiction in all actions to enforce any liability or duty created by the Act or the Regulations thereunder, there is no reason to believe that there will ever be a repetition of the peculiar factual situation presented here, where a federal court in a diversity action (32a) is asked to set aside a final judgment of a state court approving the settlement of a claim arising under the Securities Exchange Act. Quite apart from its lack of merit, therefore, the question raised by petitioners is a classic instance of a question whose "isolated significance" does not warrant review by this Court. *Rice* v. *Sioux City Cemetery, Inc.*, 349 U. S. 70, 76-77 (1955).

2. Petitioners further urge that one of the majority judges, Judge Kaufman, labored under the "misconception" that the setting aside of the state court judgment in issue was barred by res judicata, comity and other "institutional imperatives" (Pet., p. 24). Nothing could be further from the fact. Judge Kaufman's opinion (App. B, 24a-28a; 333 F. 2d at 336-338), like Judge Moore's, was based on his affirmation of the factual findings of the trial court. It was solely in response to plaintiff's argument (Pl's app. brief, pp. 46-47) for the evidentiary standard applied in a criminal case, that Judge Kaufman pointed out that "considerations of res judicata and comity" are of

far greater significance in a civil case (App. B, 27a; 333 F. 2d at 338).

3. Petitioners assert that if state law is applicable (Pet., p. 24), "a third question arises: If the state law was erroneously applied are the issues here of sufficient importance for this Court to review and reverse?" But the petition is entirely devoid of any argument or authority to the effect that the district court erroneously applied the law of New York. In fact, the district court correctly applied well-settled principles of New York law governing the situation before it.

In a federal court action to set aside a state court judgment, absent constitutional questions (of which none are here involved), the law governing the validity of the judgment attacked is the law of the state whose judgment is attacked. *Reiter* v. *Universal Marion Corp.*, 299 F. 2d 449, 453 (D.C. Cir. 1962); *Dulien Steel Prods., Inc.* v. *Connell*, 252 F. 2d 556 (5th Cir.), *cert. denied*, 356 U. S. 968 (1958); 7 Moore, Federal Practice 634 (2d ed. 1955).

Owing to the importance attached by New York to according finality to litigation (see *Crouse* v. *McVickar*, 207 N. Y. 213, 219 (1912)), it is clear that New York law bars collateral attack on the final judgments of New York state courts on the grounds asserted in this complaint:

> "The mere failure of a party to disclose to a court matters pertinent to the issues which would defeat his claim is not such extrinsic fraud as will require the setting aside of a judgment in favor of the claim."
>
> *Matter of Adoption of Brundage*, 134 N.Y.S. 2d 703, 710 (S. Ct., Orange Co. 1954), *aff'd*, 143 N.Y.S. 2d 611, *leave to appeal denied*, 144 N.Y.S. 2d 921 (2d Dep't 1955).

As the Court of Appeals for the District of Columbia stated in *Reiter* v. *Universal Marion Corp.*, 299 F. 2d at 453:

> "Appellants contend in this court that the New York case was 'under the directors' control' and could not 'be brought to trial,' and that the corporate directors, when testifying before the New York court, failed to disclose material facts bearing on the fairness of the settlement. . . . [W]e are bound by the New York law on the matter, and it seems clear that the New York courts would not permit a collateral attack upon a settlement and resulting judgment on the basis appellants urge. See Crouse *v.* McVickar, 207 N. Y. 213, 100 N.E. 697, 45 L.R.A., N.S., 1159 (1912); Chenu *v.* Board of Trustees, 12 App. Div. 2d 422, 212 N. Y. S. 2d 818 (1961)."

Accord: Jacobowitz v. *Herson*, 268 N. Y. 130, 134 (1935); *Burbrooke Mfg. Co.* v. *St. George Textile Corp.*, 283 App. Div. 640, 129 N.Y.S. 2d 588 (1st Dep't 1954); *Anchor Wire Corp.* v. *Borst*, 277 App. Div. 728, 102 N.Y.S. 2d 871 (1st Dep't 1951); *Matter of Anonymous*, 29 Misc. 2d 580, 582, 213 N.Y.S. 2d 10, 12-13 (Surr. Ct., Nassau Co. 1961).

Petitioners suggest that in failing to apprise the district court in *Breswick* of the alleged non-disclosure of material evidence before the Referee in *Zenn*, the respondents committed a fraud on that court as well as the state court (Pet., p. 15). This contention is meritless, and was properly disregarded below, since the 1950 IDS exchange transaction, to which alone the allegedly non-disclosed documents pertained, was not before the court in the *Breswick* litigation (see *supra*, pp. 5-6).

4. Petitioners assert that, "An additional issue of federal importance arises out of an independent fraud

on the federal court which passed on the settlement attacked by this suit" (Pet., p. 25), namely, Ireland's appearance as counsel of record for Alleghany.

But the representatives of Alleghany's interests in *Breswick* was and had been the *Breswick* plaintiffs and their counsel; Alleghany's counsel of record in *Breswick* had always represented, with the court's knowledge and without objection, one or another of the defendants. *Breswick* v. *Briggs*, 135 F. Supp. 397, 403 (S.D.N.Y. 1955) Moreover, the federal court in *Breswick* did not pass on or purport to pass on the *Zenn* settlement attacked in this action, and the 1950 IDS exchange transaction was not even involved in *Breswick* (924a-25a).

Petitioners' fourth "issue" was not tendered at the trial below; it was raised for the first time before the Court of Appeals. No member of the Court of Appeals made any reference whatever to this charge.

5. Finally, petitioners say that they would also raise "a jurisdictional issue which arises as a result of this Court's decision in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964)," which last year decided for the first time that full relief for a violation of Section 14(a) is available to a stockholder in the federal courts. Petitioners urge, on the basis of *Borak*, that the New York Supreme Court never had jurisdiction in *Zenn*.

The Court of Appeals' unanimous rejection of this contention (App. A, 2a-3a; 340 F.2d 311) was obviously correct since this issue was specifically litigated in *Zenn* and the decision of the Supreme Court, New York County, rejecting the challenge to its jurisdiction, was affirmed on appeal by the Appellate Division.* No review by this

* Prior to *Borak*, other authorities supported the state court's assumption of jurisdiction.

Court was sought. The rule is well-established that where a question of jurisdiction over the subject matter is raised and litigated in a state court, and particularly where the question is appealed to and decided by the state appellate courts, that decision is res judicata and cannot be collaterally attacked as erroneous in another proceeding. *E.g.*, *Durfee* v. *Duke*, 375 U. S. 106, 111 (1963); *Treinies* v. *Sunshine Min. Co.*, 308 U. S. 66 (1939); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U. S. 522, 525-26 (1931); *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166-67 (1932); *United States* v. *Eastport S.S. Corp.*, 255 F.2d 795, 802-03 (2d Cir. 1958); *Dairy Distributors, Inc.* v. *Western Conference of Teamsters*, 294 F.2d 348, 352 (10th Cir. 1961), *cert. denied*, 368 U. S. 988 (1962).

Conclusion

The principal question presented by the petition herein is a question of fact, which does not merit review by this Court. None of the purported questions of Federal law propounded by petitioners is in fact presented by the record in this action. Insofar as petitioners seek to review the correctness of the district court's application of New York law, the decision below was clearly in accordance with that law as construed by the New York state courts and calls for no further review by this Court.

In the event this Court denies certiorari in No. 1157, the petition herein must be dismissed for the reason that this is not a petition by a party, as required by 28 U.S.C.

§1254(1). Alternatively, for the reasons stated above, it should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 132

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

—against—

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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January 21, 1966

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